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The personal is still political: Sexual orientation, gender identity and the politics of law making in Africa

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Abstract

This chapter critically examines the politicisation of sexual orientation and gender identity (SOGIE) rights in Africa. It highlights how anachronistic, colonial-era sodomy laws have evolved into a second wave of harsh anti-homosexuality legislation. Despite growing international recognition of SOGIE rights as fundamental human rights, many African states have intensified efforts to criminalise queerness under the guise of protecting morality, family values, and national identity. The chapter analyses the legal, political and socio-cultural dynamics that sustain this trend, with a particular focus on Uganda, Nigeria and Ghana, whose laws serve as case studies of widespread legalised repression. These laws not only criminalise same-sex acts and relationships but also ban advocacy, restrict freedom of association, and impose surveillance obligations on citizens. The proliferation of such laws is rooted in a complex interplay of factors, including colonial legacies, religious fundamentalism, and the instrumentalisation of queerness as a symbol of resistance to Western

influence. The chapter also addresses the role of institutions such as the church and state in perpetuating discrimination and violence, often with impunity. It contrasts these regressive trends with progressive developments in jurisdictions such as Namibia, South Africa and Botswana, where courts have moved to protect SOGIE rights despite significant push-back. Drawing from feminist theory – particularly the notion that 'the personal is political' – the chapter reframes the oppression of queer Africans as a political crisis rather than a private issue of morality. It concludes by advocating collective action and regional solidarity to challenge the legal and cultural systems that dehumanise queer identities. By doing so, the chapter situates SOGIE rights within the broader fight for human dignity, equality and decolonisation in Africa, insisting that meaningful change requires confronting the political roots of exclusion and affirming the humanity of all individuals, regardless of their identity.

Key words: *anti-homosexuality; gender identity; human rights; SOGIE rights; LGBTIQ+ rights*

1 Introduction

Anachronistic penal laws in many African states have been weaponised to persecute and undermine the rights of members of the queer community. These colonially influenced penal laws have been used to reject the demands for national law reforms and to accommodate issues of sexual identity and orientation in many African states. It is generally accepted that these laws are an affront to the rights protected by customary international law and many international human rights treaties.[1] Yet, Africa has seen the duplication of another generation of harsher penal laws designed to enhance the persecution and punishment of, mostly, members of the queer community. As illustrated in the later parts of this chapter, some African states adopted harsher laws to address what has been described as an abomination, unnatural and un-African

1 UN Resolution A/63/635 of 22 December 2008 which recognises that international human rights law also includes the protection against gender-based violence or discrimination due to sexual orientation.

by legislators in those countries. These states include Uganda,[2] Nigeria[3] and Ghana.[4]

The impact of these laws has far-reaching consequences, as they affect national policy making in areas such as health, education, prisons, and the promotion and protection of sexual orientation, gender identity and equality (SOGIE) rights. These new laws are certainly aimed at undermining any progress and global commitments on issues relating to SOGIE. Further, the laws are totally oblivious to the power imbalances that they entrench by othering and dehumanising queerness.

This, of course, is not to take away from progressive developments that have taken place in countries such as Angola,[5] Botswana,[6] Mauritius,[7] Mozambique[8] and Namibia.[9] In these countries, judiciaries and

2 J Paul & S Falcetta 'Beyond the Anti-Homosexuality Act: Homosexuality and the Parliament of Uganda' (2021) 74 *Parliamentary Affairs* 56; S Namusoga-Kaale 'The nation, the press and homosexuality: Framing national identity in Uganda' in D Oyedemi & RA Smith (eds) *Media in Africa: Issues and critiques* (2024)171.

3 T Adebanjo 'In search of a middle ground: Addressing cultural and religious influences on the criminalisation of homosexuality in Nigeria' in D Ebenezer and others (eds) *Advancing sexual and reproductive health and rights in Africa* (2021) 50; P Onanuga & J Schmied 'Policing sexuality? Corpus linguistic perspectives to "government" in homosexuality narratives on Nigerian Twitter' (2022) 31 *Journal of Gender Studies* 830.

4 D Aryeh 'Homosexuality in Ghana today: The role of the church in mission' (2022) 15 *E-Journal of Humanities, Arts and Social Sciences* 26; E Ako 'Same-sex relationships and recriminalisation of homosexuality in Ghana: A historical analysis' (2023) 17 *Sociolinguistic Studies* 46; R Shine 'Ghana's bishops endorse Bill to criminalise "abominable practice" of homosexuality' New Ways Ministry (Ghana) 12 October 2021.

5 R Bivens 'Progress and skepticism: What Angola's new Penal Code means for its LGBTQIA+ community' (2024) 70 *Africa Today* 25.

6 G Lekgowe 'A new dawn for gay rights in Botswana: A commentary on the decision of the High Court and Court of Appeal in the *Motshidiemang* cases' (2023) 67 *Journal of African Law* 477; T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General* (*LEGABIBO as amicus curiae*) (2019) 19 *African Human Rights Law Journal* 843.

7 H Lau 'Decriminalising same-sex sexual activity: Jurisprudence from the Global South' (2025) 23 *International Journal of Constitutional Law* 22.

8 G Gomes da Costa Santos & M Waites 'Analysing African advances against homophobia in Mozambique: How decriminalisation and anti-discrimination reforms proceed without LGBT identities' (2022) 26 *Sexuality and Culture* 548; C Aantjes and others 'Why doesn't the decriminalisation of same-sex sexuality and sex work ensure rights? The legality and social acceptance of transgressive sexualities in urban Mozambique' (2021) 19 *International Journal on Sexuality Research and Social Policy* 416.

9 J Mujuzi 'Equality before the law and the recognition of same-sex foreign marriages in Namibia: *Digashu and Another v GRN and Others*; *Seiler-Lilles and*

legislatures have ensured the protection of SOGIE rights. As illustrated below, even in these jurisdictions there have been some notable push-backs against these positive developments.

What is perplexing and preoccupies our minds in this intervention is that, despite the widely accepted truism that SOGIE rights are as much human rights as any other human right, many African states continue to reject these. Instead, there is the proliferation of the so-called 'anti-homosexuality' laws. The deep-seated refusal to acknowledge and protect SOGIE rights, therefore, continues to gather support despite the reality that not all African states have adopted such harsh penal laws. In addition, the tone set by African Union (AU) organs such as the African Commission on Human and Peoples' Rights (African Commission) is indicative of such support.[10] Notwithstanding, discussions surrounding the advancement of SOGIE rights are still couched in the rights language with the conviction that the effective protection of SOGIE rights will or maybe be secured under the right to equality and non-discrimination. However, this approach does not adequately account for the politicisation of SOGIE rights and the quest to present them as personal and morality issues that are best outlawed because they are unnatural and immoral.

It is against this background that the chapter enquires into the possible reasons behind the lack of progress in promoting and protecting SOGIE rights in Africa. The chapter seeks to inspire a dialogue on appropriate ways of responding to these second generation or anti-wave anti-homosexuality laws in Africa. It argues that SOGIE rights remain an intractable problem of human rights in Africa. Despite the adoption of international treaties and constitutional rights provisions, SOGIE rights are still undermined by the very states that have committed to the ideals of equality and non-discrimination, among others. This anomaly demands greater scrutiny because the argument that these states have a poor human rights record is no longer sustainable. It is not sustainable because there is ample evidence that the legislatures in these countries are

Another v GRN and Others [2023] NASC 14' (2023) 23 *International Journal of Discrimination and the Law* 321.

10 L Mute 'Sexual minorities and African human rights mechanisms: Reflections on contexts and considerations for addressing discrimination' (2023) 7 *African Human Rights Yearbook* 183; M Ssenyonjo 'Sexual orientation and the criminalisation of private consensual sexual acts between adults of the same gender' (2023) 12 *International Human Rights Law Review* 143.

very much aware of their commitments, the nature of these rights and what they mean for queer communities in those countries.

Following this introduction, part 2 of this chapter provides a summary of the state of the protection of SOGIE rights in Africa. This is followed by a discussion of the nature and content of the 'anti-homosexuality' laws adopted in some African states in part 3. Part 4 characterises SOGIE rights as an intractable problem of human rights. Using the case studies discussed in part 3 of the chapter, the part highlights why SOGIE rights will continue to be an intractable problem in human rights. In this part, the chapter highlights the national and international community response to these laws as well. Part 5 presents concluding observations.

2 The protection of human rights relating to sexual orientation and gender identity in Africa

There is ample literature on the state of protecting SOGIE rights in Africa. Most studies lament the declining promotion and protection of members of the queer community. Some fall short of outright declaring Africa as entirely homophobic. The nature and extent of the protection of SOGIE rights in Africa are inconsistent and, as such, cannot, and should not, be generalised. It is also difficult to characterise with a certain level of exactitude. This is because of the various factors that enhance and impede the promotion and protection of the rights of members of the queer community in these jurisdictions. Such factors are embedded within religious, traditional, policy, legal and institutional orders that are clearly ill-equipped to provide sufficient protection to members of the queer community. The symbiotic relationship of these orders, in turn, has created nuances that, in the end, are peculiar to a country or society.

Studies carried out in the past five years on the promotion and protection of SOGIE rights in Africa indicate the precarious situation in which members of the queer community find themselves. Studies highlight that homosexuality and same-sex relations are outlawed in most African countries. In fact, of the 54 African states, 30 states criminalise homosexuality. In some countries, the distinction between same-sex acts and one's sexual orientation has been collapsed. Thus, identifying as gay, bisexual or transgender has been effectively criminalised. As illustrated in part 3 of this chapter, the prescribed punishment under these anti-homosexuality or sodomy laws is severe, ranging from long prison sentences to the death penalty for 'aggravated homosexuality'. Arrests,

detentions and prosecutions in furtherance of these laws are regular occurrences in most parts of Africa.

Nevertheless, several countries in Africa have never criminalised homosexuality.[11] These countries were joined by others in amending their laws to remove 'sodomy laws' either through the legislative amendments[12] or court-led reforms.[13] These legislative and judicial reforms are a result of many years of civil society activism, lobbying and queer lawfare.[14] The recent judicial reforms were ushered in by the supreme courts of Mauritius and Namibia. In May 2023, the Supreme Court of Namibia recognised same-sex marriages.[15] This decision was followed by that of the Namibian High Court in the case of *Dausab v The Minister of Justice,*[16] where the Court struck down sodomy laws. The Court highlighted that the sodomy laws served no legitimate purpose, were not 'reasonably justifiable' in a democratic society and that 'the criminalisation ... is outweighed by the harmful and prejudicial impact it has on gay men'.[17]

Similarly, in October 2023, the Supreme Court of Mauritius also decriminalised same-sex relations in the case of *Abdool Ridwan Firaas Ah Seek v The State of Mauritius.*[18] In this case, the Court interpreted the word 'sex' in section 16 of the Constitution of Mauritius to include 'sexual orientation'. This, according to the Court, was in accordance with the country's obligations under the International Covenant on Civil and Political Rights, 1966 (ICCPR).[19]

11 Central African Republic, Djibouti, Côte d'Ivoire, the Democratic Republic of the Congo, the Republic of the Congo, Equatorial Guinea, Madagascar, Mali, Niger and Rwanda.

12 Angola, Cape Verde, Gabon, Guinea-Bissau, Lesotho, Mauritius, Mozambique, Namibia, São Tomé and Príncipe, the Seychelles and South Africa.

13 *Attorney General v Letsweletse Motshidiemang and LEGABIBO (as amicus)* [2019] 4 BLR 167; *Letsweletse Motshidiemang v Attorney General &Others* in which the Botswana Court of Appeal confirmed the High Court decision to strike down sodomy laws; *Motshidiemang v Attorney General (Lesbians, Gays & Bisexuals of Botswana as Amicus Curiae)* [2019] 4 BLR 143 (HC).

14 S Gloppen 'Queer lawfare in Africa: Introduction and theoretical framework' in A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicization* (2022) 3.

15 *Digashu & Another v GRN*; *Seiler-Lilles & Another v GRN* [2023] NASC 14.

16 *Dausab v The Minister of Justice* [2024] NAHCMD 331.

17 *Dausab* (n 16) 20.

18 *Abdool Ridwan Firaas Ah Seek v The State of Mauritius,* Record 119259.

19 *Abdool Ridwan Firaas Ah Seek* (n 18) 17.

The decriminalisation of homosexuality was, in some countries, preceded by efforts to register lesbian, gay, bisexual, transgender, intersex, queer (or questioning) (LGBTIQ+) organisations. The registration of these organisations or societies was refused on account of the sodomy laws, because the objectives of the said organisations were in furtherance of homosexual and illegal activities. In fact, the courts in Botswana,[20] Kenya[21] and Swaziland[22] had at one point adjudicated these cases with success in in Botswana, Lesotho and Kenya but without success in Swaziland.

There have been some instances where litigants have approached the courts to challenge laws that prevented them from changing their gender markers. The gender marker cases have so far brought to the fore challenges faced by intersex and transgender persons. This is to the extent that national registration laws in these countries are not designed in a manner that permits, without court intervention, the change of one's gender marker. Most countries do not have laws that address issues related to changing a gender marker, among others. South Africa is one of two countries in Southern Africa with specific rules on the change of gender marker.[23] Even though an application for changing a gender marker was successful in Botswana, the approach taken by the Botswana High Court is criticised for being medicalised.[24]

Moreover, South Africa remains the only country in Africa where same-sex marriage has been legalised, having enacted the Civil Union Act in 2006.[25] This, in fact, is consistent with the 1994 South African Constitution's equality provisions and prohibition of discrimination based on one's sexual orientation.[26] The jurisprudence of the South

20 *Attorney-General v Rammoge & Others* [2017] 1 BLR 494 (CA).
21 *NGOS Co-ordination Board v Eric Gitari & 5 Others* Judgment Supreme Court Petition16 of 2019.
22 *Melusi Simelane NO & Others v Minister of Commerce and Industry & Others* Civil Case 34/2022.
23 Alteration of Sex Description and Sex Status Act 49 of 2003 sec 2(1); Births, Marriages and Deaths Registration Act 81 of 1963 sec 7B. .
24 L Olebile 'The status of LGBTI rights in Botswana and its implications for social justice' in S Namwase & A Jjuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 190.
25 P de Vos & J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795.
26 Art 9(3) The Constitution of the Republic of South Africa, 1996.

African Constitutional Court has been instructive and relied on by courts from other jurisdictions when striking down sodomy laws.[27]

There is also ample evidence of repression and violations of SOGIE rights in North Africa.[28] In Central and West Africa, with Ghana and Nigeria leading the pack, there is evidence of increasing legislative intolerance of members of the LGBTIQ+ in most countries. Most East African countries fare poorly in so far as the protection of SOGIE rights is concerned. This is evidenced by the anti-homosexuality laws in Uganda as well as failed queer law fare efforts in Kenya and Uganda.

Clearly, anti-homosexuality laws are the principal barrier to the effective promotion and protection of the rights of members of the LGBTIQ+ community. Several studies confirm this and illustrate how such laws are a hindrance to, among other things, the adoption and implementation of inclusive national health policies.[29] As has been rightly pointed out:[30]

> It is crucial to acknowledge that these challenges faced by LGBTI people in Africa extend beyond the realm of legality, encompassing a profound struggle for the hearts and minds of societies. However, the abuse of law has undoubtedly heightened their vulnerability and underlines the urgent necessity for coordinated regional and international intervention.

Members of the LGBTIQ+ community face widespread discrimination by the community on account of their identity or sexual orientation. The lack of equal treatment has relegated them to the periphery of society as they are denied basic health care, reproductive health care, access to justice and many other basic human rights that are extended to their fellow citizens by the state. This marginalisation is best explained by

27 *Attorney General v Letsweletse Motshidiemang and LEGABIBO (as amicus)* [2019] 4 BLR 167 166*; Eric Gitari v Non-Governmental Organisations Coordination Board & 4 Others* [2015] eKLR para 90; *Abdool Ridwan Firaas Ah Seek v The State of Mauritius* Record 119259 8.

28 S Feki 'The Arab bed spring? Sexual rights in troubled times across the Middle East and North Africa' (2015) 23 *Reproductive Health Matters* 38.

29 M van Hout and others 'Moving beyond the politisation of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons' (2022) 3 *Forensic Science International: Mind and Law* 1.

30 Amnesty International 'Africa: Barrage of discriminatory laws stoking hate against LGBTI' 9 January2024, https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of-discriminatory-laws-stoking-hate-against-lgbti-persons/ (accessed 22 August 2024).

Zundel and Debele in their intervention in this compilation.[31] Further, their rights to liberty and privacy have been severely compromised as, in some instance, they are subjected to anal testing,[32] invasive search and seizure processes by state authorities and corrective surgeries in the case of intersex persons.

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) are to the effect that all citizens are entitled to the enjoyment of their right to security of the person.[33] The Principles impose a further corresponding obligation on the part of the state to protect members of the queer community from violence or bodily harm.[34] Notwithstanding that the right to security of the person is constitutionally guaranteed in many countries in Africa, members of the LGBTIQ+ community in Africa have been subjected to unacceptable levels of violence. Unfortunately, the LGBTIQ+ community in Africa enjoys little to no protection from the state apparatus, as law enforcement officials are, in most jurisdictions, complicit. This is confirmed by reported cases of corrective rapes, assault and other abuses that have compromised their right to liberty and security of the person. In most instances, these abuses are not investigated when reported. As a result, a significant number of these deaths and disappearances have not attracted any severe sanctions from state authorities.

Again, anti-homosexuality laws have been weaponised by law enforcement officials to justify state-sponsored violence against members of the LGBTIQ+. This explains why violence against members of the queer community is less questioned and is normalised in most African societies. The challenges outlined above persist even in countries where the laws are deemed to be 'accommodative', which simply means that the laws have not criminalised members of the LGBTIQ+.

31 I Zundel & MY Debele 'The human as an intractable problem of the law: A critical appraisal' in ch 2 of this book.

32 Human Rights Watch 'Dignity debased: Forced anal examinations in homosexuality prosecutions' 12 July 2016, https://www.hrw.org/report/2016/07/12/dignity-debased/forced-anal-examinations-homosexuality-prosecutions (accessed 22 August 2024).

33 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) Principle 5.

34 As above.

The negative impact of legislation that outlaws same-sex relations has not been a hindrance to the promulgation of even harsher laws to address the 'scourge of homosexuality' in Africa. Nigeria adopted an anti-homosexuality law in 2014 then Uganda, Kenya and Ghana followed suit with the adoption of similar laws. Not only were these laws adopted to address what has been described by some as a societal moral decay, but they also sought to express public outrage against immorality and homosexuality. This outrage is discernible from the nature and content of these pieces of legislation, as discussed below.

3 Nature and content of anti-homosexuality laws in Africa: Selected examples

The objective of anti-homosexuality laws in Africa bears a significant resemblance. The similarity of these laws is discernible from, among other things, the aims and objectives of the laws, the offences and punishments set out thereunder. As will be demonstrated below, there is a need to underline these similarities before explaining why these laws persist in the age of globalisation and human rights. For purposes of this part, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Act of 2021, the Nigerian Same Sex Marriage (Prohibition) Act of 2013 and the Uganda Anti-Homosexuality Act of 2023 are discussed.

Principally, all three acts of Parliament were adopted for the purposes of outlawing same-sex relationships, and activities between adults, prohibition of promotion of homosexuality and same-sex marriages. The Preambles to the pieces of legislation point to this fact. Whereas in the case of Ghana and Nigeria, the Preamble does not explicitly set out these objectives, the rest of the provisions of the Act do so. In the case of Ghana, the Preamble to the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Act indicates that the law seeks to make provision for 'proper human sexual rights and Ghanaian family values'.

Although the Ugandan and Nigerian legislators do not use the terms 'proper sexual conduct' and 'family values', the provisions of these statutes ban homosexuality, have outlawed same-sex acts and same-sex marriages, outrightly taken away the right of association of members of the LGBTIQ+ family. They have effectively prescribed what may be considered 'proper sexual conduct' or 'family values'. With the stroke of a pen, the legislators have legislated, for all citizens in those jurisdictions, what amounts to 'proper sexual conduct' and 'family values'.

The extent and reach of these laws are wide and extend beyond those who are deemed members of the LGBTIQ+ community. The Ghanaian Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill 'proscribe LGBTQ+ and related activities'[35] as well as the 'promotion of LGBTTQQIAPP+ and related activities'.[36] The three statutes, in addition to being subject-specific in some instances, apply to all persons. To that end, the Uganda Anti-Homosexuality Act imposes a duty on all to report any known acts of homosexuality.[37] Consistent with that duty, the duty to report any known acts of homosexuality is not discharged due to the existence of any form of privilege such as attorney-client or doctor-patient privilege. The Act does take away the privilege that, for example, may exist between a doctor and patient by affording the doctor absolute immunity from any suit arising from the disclosure of the information with permission or waiver of privilege.[38] The Ghanaian Promotion of Proper Human Sexual Rights and Ghanaian Family Values Act also imposes a duty on citizens to report any person who commits any offence under the Act.[39] This is consistent with the duty imposed on citizens to 'promote and protect the proper human sexual rights and Ghanaian family values' set out under the Act.[40] Undermining the proper human sexual rights and Ghanaian family values carries a possible prison term of a minimum of two months and a maximum of four months.[41]

Additionally, the provisions of these Acts are sweeping in nature, with the provisions open to interpretation in various ways to punish. Such laws are most likely to be interpreted and weaponised to punish those who might find themselves on the wrong side of the state apparatus. For example, section 12(2) of the Ghanaian Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill provides

35 Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 sec 2 defines LGBTQA+ as inclusive of 'lesbian, gay, bisexual, transgender, queer, ally and any other sociocultural notion of sex and sexual relationship that is contrary to the socio-cultural notion of male and female assigned at birth'.

36 Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 sec 2 defines LGBTTQQIAAP+ as inclusive of 'lesbian, gay, bisexual, transgender, transsexual, queer, questioning, intersex, ally, asexual, pansexual and any other socio-cultural notion of sex and sexual relationship that is contrary to the socio-cultural notion of male and female assigned at birth."

37 Sec 14 Anti-Homosexuality Act, 2023.

38 Sec 13 Anti-Homosexuality Act.

39 Clause 5 Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

40 Clause 3 Proper Human Sexual Rights and Ghanaian Family Values Bill.

41 Clause 4 Proper Human Sexual Rights and Ghanaian Family Values Bill.

that a person commits an offence if they promote or support 'sympathy for an act prohibited' by the Act. The definition of LGBTTQQIAPP+ is also too wide and subjective to the extent that it includes 'any other sociocultural notion of sex and sexual relationship that is contrary to the sociocultural notion of male and female assigned at birth'.[42] Section 4(2) of the Nigerian Same Sex Marriage (Prohibition) Act outlaws '[t]he public show of same-sex amorous relationship directly or indirectly'. The inchoate offences provision, section 3(4), of the Uganda Anti-Homosexuality provides:

> A person shall be deemed to attempt to commit an offence when the person intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence.

The adoption of laws couched in such vague and general terms violates the well-known principle that a law of general application needs to be certain. As part of the rule of law, this principle demands that the law must be sufficiently clear to enable citizens to better regulate their conduct.[43] Recent anti-homosexuality laws are inherently subjective and, thus, fall far short of the demand for legal certainty and, consequently, the rule of law.

Another prominent feature of these laws regards the prohibition on organisations that are deemed to be promoting and advocating activities that are prohibited under the Act. In the case of Ghana, the Act prohibits 'propaganda of, promotion of and advocacy for activities prohibited' under the Act.[44] The prohibition extends to the use of all forms of media to promote the activities that are set out under the law.[45] The Act outlaws displaying any sympathy for acts that are prohibited under Act[46] and, in some instances, criminalises offering support to members of the LGBTIQ+ community.[47] The same approach can be located under both

42 Clause 2 Proper Human Sexual Rights and Ghanaian Family Values Bill.
43 O Shcherbanyuk and others 'Legal nature of the principle of legal certainty as a component element of the rule of law' (2023) 13 *Juridical Tribune-Review of Comparative and International Law* 23.
44 Clause 12 Proper Human Sexual Rights and Ghanaian Family Values Bill.
45 As above.
46 Clause 12(2)(b) Proper Human Sexual Rights and Ghanaian Family Values Bill.
47 Clause 12(1) Proper Human Sexual Rights and Ghanaian Family Values Bill.

the Same-Sex Marriage Prohibition Act of Nigeria[48] and the Ugandan Anti-Homosexuality Act.[49] It is important to note that the promotion of homosexuality in this instance extends beyond activism and expressing sympathy for prohibited acts; it also includes offering financial aid[50] to 'facilitate activities that encourage homosexuality or the observance or normalisation of conduct prohibited under the Act'.[51]

In addition to the above, Ghanaian and Ugandan statutes have provisions aimed at protecting children. Under the Ugandan statute, offences against children fall under what has been characterised as aggravated homosexuality[52] and child grooming.[53] The offence of aggravated homosexuality is committed in instances where, among others, a person who commits the offence of homosexuality on a child[54] is a parent, relative or guardian of the person against whom the offence is committed;[55] the person is a serial offender;[56] the person against whom the offence is committed is a person with disability or suffers disability as a result of the sexual act; and the person against whom the offence is committed is of advanced age.[57] The maximum penalty for child grooming is life imprisonment.[58] with death being the maximum penalty for aggravated homosexuality.[59] Section 13(1) of the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Act makes it an offence for one to share material or information likely to evoke the interest of the child in acts that are prohibited under the Act. Further, teaching a 'child to explore any gender or sex other than the binary category of male or female' is an offence.[60] In both instances, a person

48 Sec 5 Same Sex Marriage (Prohibition) Act, 2013.
49 Sec 11 Anti-Homosexuality Act.
50 Sec 4 Same Sex Marriage (Prohibition) Act; clause 12(3) Proper Human Sexual Rights and Ghanaian Family Values Bill.
51 Sec 11(2)(c) Anti-Homosexuality Act.
52 Sec 3(2) Anti-Homosexuality Act. When examined closely, the provision introduces the concept of vulnerability in homosexuality.
53 Sec 8 Anti-Homosexuality Act.
54 Sec 3(2)(a) Anti-Homosexuality Act.
55 Sec 3(2)(b) Anti-Homosexuality Act.
56 Sec 3(2)(d) Anti-Homosexuality Act.
57 Sec 3(2)(g) Anti-Homosexuality Act.
58 Sec 8(1)(d) Anti-Homosexuality Act.
59 Sec 3(1) Anti-Homosexuality Act.
60 Clause 13(1)(c) & (d) Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

found guilty will be liable to a term of imprisonment of not less than six years and not more than ten years.[61]

Clearly, the penalties under these laws are harsh as the statutes were promulgated as a deterrence to 'unnatural' and 'abnormal activities'. The penalties include hefty fines, imprisonment for a period of more than 10 years and death. In the case of Uganda, homosexuality carries a penalty of imprisonment for a maximum period of 10 years,[62] with aggravated homosexuality carrying the death penalty.[63] In Nigeria, entering into a same-sex marriage attracts a penalty of an imprisonment term of up to 14 years.[64] In the case of Ghana, a person who commits the offence of homosexuality is liable to be sentenced to a minimum period of three years and a maximum period of five years.[65]

Further to the above, the laws from the three countries no doubt are in violation of some of the countries' constitutional provisions and their obligations under international law. In fact, the several rights denied by these laws include the rights to freedom from discrimination, equality, privacy, liberty, dignity and freedom of association.

4 Violation of SOGIE rights as an intractable problem of human rights

The history of sodomy laws in Africa is part of the continent's history of colonisation. As scholars have pointed it out, Africa inherited these laws.[66] This explains why, for example, sodomy laws in Anglophone Africa are similar. These laws have, as a result, been characterised as remnants of Africa's colonial history and past. This reality has neither been seriously challenged nor prevented the enactment of similar, though even harsher, laws across Africa. Therefore, it is correct to conclude that the origins of these laws are, to most African legislators, irrelevant. Many states in Africa have embraced the utility of these laws, explaining why they have been weaponised to support the gross and massive violation of the rights of members of the LGBTIQ+ community in many parts of Africa.

61 As above.
62 Sec 2(3) Anti-Homosexuality Act.
63 Sec 3 Anti-Homosexuality Act.
64 Sec 5(1) Same Sex Marriage (Prohibition) Act, 2013.
65 Clause 6(3) Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.
66 Gloppen (n 14) 6.

It is surprising that the adoption of anti-homosexuality laws in Africa has ignored the origins of sodomy laws. This is despite the usual rhetoric that the decolonisation endeavour in Africa should be carried out in earnest. For example, there have been arguments in favour of a cultural relativist approach to the application of international human rights norms in Africa, as they are largely viewed as a creation of the West. It should, therefore, be considered a total break or departure from this 'norm' for African states to embrace sodomy laws and then take another step to enhance them through anti-homosexuality laws.

It might be argued that there is no internal contradiction in this approach. In fact, African states, through these sodomy and anti-homosexuality laws, are rejecting SOGIE rights, which are also a creature of the West. However, that still does not address the contradiction highlighted above in that African legislators have embraced sodomy laws notwithstanding their origin.

Of course, Africa has always, to some extent, been resistant to the introduction, domestication and universalisation of international human rights norms. For example, criminalising female genital mutilation, legalising abortion or sex work, and regulating child labour have all been resisted in some parts of Africa. Granted, it is not only the implementation of SOGIE rights that have been met with some form of resistance. However, the resistance to other human rights reforms has not evoked the level of violence that is discernible from anti-homosexuality laws in Africa.

The dehumanisation and othering of members of the LGBTIQ+ community underscores the violation of SOGIE rights in Africa. Members of the LGBTIQ+ community are treated as lesser beings among citizens, deserving little to no protection from both the public and the state.[67] This point is poignantly captured by Zundel and Debele in chapter 2 of this book, who ask: 'When we are working with an exclusionary notion of the human, how can the law protect queer Africans even if a country has a liberal legal framework that claims the protection of all?

Flowing from the above fact – that members of the queer community are considered lesser humans deserving little to no state protection – is the

67 Zundel and Debele (n 31) ch 2.

politicisation of SOGIE rights by many African states. By this, we mean that SOGIE rights have since metamorphosed into a highly contested political subject.[68] In many African states, a stand against anything related to SOGIE issues or rights is deemed a ticket to more votes, as there is always an assumption of a collective stance against SOGIE rights or issues. At one point, a former President of Botswana was quoted indicating that his reluctance to support SOGIE rights was out of fear of the ruling party losing voters.[69] The position taken by many states that favour sodomy and anti-homosexuality laws is largely influenced by the fact that many legislators are convinced that supporting members of the queer community will lead to loss of elections to political office. While this is wrong – as evidenced by the Botswana example discussed above – legislators have clearly declared this as a risk that they are unwilling to take. Standing up to the West, therefore, is considered a lesser risk. This chapter deals with the implications of this resistance in the later parts.

One of the main actors in the politicisation of SOGIE issues or rights is the church. The church is fingered as responsible for sponsoring the African crusade against SOGIE rights or issues.[70] It is beyond doubt that Africa has been declared *de facto* a religious continent. In addition to SOGIE rights being un-African, they are also considered ungodly. In furtherance of this collective godliness, the church often argues against and protests any reforms that may be indicative of the inclusion of members of the queer community. For example, when Parliament in Botswana attempted to amend the law to implement the decision of the Court of Appeal decriminalising homosexuality, the church took to the streets in protest.[71] The church was also angered when Botswana's Constitution Reform Commission recommended that the Constitution

68 Gloppen (n 14) 23; P Awondo 'The politicisation of sexuality and rise of homosexual movements in post-colonial Cameroon' (2010) 37 *Review of African Political Economy* 315.

69 Online Editor 'Selective activism: Festus Mogae the converted hypocrite' *Sunday Standard* (Gaborone) 8 February 2-16; see further M Tabengwa & N Nicol 'The development of sexual rights and the LGBTI movement in Botswana' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for discrimination and change* (2013) 339; A Mmolai-Chalmers & A Meerkotter 'Sexual orientation and the right to organise the case of LEGABIBO in Botswana' (2016) 37 *Harvard International Review* 94.

70 M Ananyev & P Michael 'Christian missions and anti-gay attitudes in Africa' (2021) 184 *Journal of Economic Behaviour and Organisation* 359.

71 M Dube 'Botswana churches urge parliament to vote against bill on same-sex relations' *Voice of America* 25 July 2023, https://www.voanews.com/a/botswana-

should, under its equality and non-discrimination provisions, provide for intersex persons.[72] Exhibiting a spectacular lack of knowledge on the issues at hand, the church strongly argued against the amendment.

The agenda by the church has so far ensured that there is little to no progress in the promotion and protection of SOGIE rights in Africa. It has taken advantage of the pursuit of collective godliness by Africans, despite the apparent double standard, to undermine the progress for the promotion and protection of SOGIE rights.

International donors from the West are often accused of funding and encouraging homosexuality in Africa. The fact that civil society in African countries advocating the promotion and protection of members of the LGBTIQ+ receives most of their funding from Western donors has incensed most African legislators. The funding has been singled out as evidence of the agenda by the West to propagate homosexuality in Africa. This explains why there are provisions in the anti-homosexuality laws that outlaw funding and supporting non-governmental organisations (NGOs) that advocate SOGIE issues and rights. Legislatures in Africa have used this funding to justify the adoption of anti-homosexuality laws.

However much one looks at it, no concrete evidence supports the reasons given by African states when adopting anti-homosexuality laws. In particular, there is no evidence that the West is the cause of the increasing number of members of the LGBTIQ+ community in Africa. Yet, many choose to believe that narrative, with politicians in Africa exploiting and using this argument for political mileage. Debates in parliaments are usually highly charged, with speaker after speaker often supporting the promulgation of an anti-homosexuality piece of legislation. In most cases, support is necessary, and it is expected, if one is to continue to count on voters to elect them back into parliament. Even though there is no proven connection between the support for SOGIE issues or rights and poor performance in elections, the fear of losing elections alone is sufficient to cause politicians to support anti-homosexuality laws.

churches-urge-parliament-to-vote-against-bill-on-same-sex-relations-/7194996.html (accessed 22 August 2024).

72 I Selatlhwa 'EFB petitions parley over constitution amendment' *Mmegionline* 20 May 2024.

The discourse on SOGIE rights, Africa and colonialism has so far been focused on the origins of sodomy laws and how such laws to date have been weaponised to undermine the rights of members of the LGBTIQ+. To that end and, as aforementioned, sodomy laws have been identified as a legacy of colonialism in Africa and other former colonies with similar laws. On the other hand, it has been argued that the 'approach to (anti)homophobia and human rights-based discourses provides an understanding of sexual orientation-based development as gay imperialism'.[73] Clearly, African states have embraced sodomy laws as evidenced by their reluctance to amend their penal laws and vowing, instead, to fight 'gay imperialism' employing vestiges of colonial rule in Africa.

The fight against 'gay imperialism' best explains why, despite civil society efforts to promote and protect SOGIE rights, there is little gain in many countries. When asked to abandon plans to adopt harsh anti-homosexuality laws and to ensure an end to the persecution of members of the LGBTIQ+ community, most African leaders argue that the West cannot dictate to them how to deal with issues of sexuality. They further denounce the West for encouraging and financing homosexuality which, according to them, is immoral and un-African. Strong positions are then taken with threats of reduced donor funding or sanctions often totally ignored.[74] SOGIE rights are also a site for the fight against imperialism in its totality. Specifically, there is a general assertion that the support of SOGIE rights by countries in the West is indicative of colonial domination. While African states have often been deemed to have failed to stand up to the West in other areas of international relations, such as trade and investment, international criminal justice, UN reforms and the use of force, among others, they have somehow found a united front against the enhanced promotion and protection of the rights of members of the LGBTIQ+ community. This passionate resistance can only make sense if viewed through the prism of the fight against imperialism and

73 M Muna-Udbi 'Un-mapping gay imperialism: A postcolonial approach to sexual orientation-based development' (2017) 5 *Reconsidering Development* 1.

74 In drawing the parallels and similarities, we are in no way equating the challenges faced by women with those faced by members of the LGBTIQ+ community. We are alive to the unique circumstances that each is faced with in navigating the social structures that are beset with oppression and societal inequalities.

colonial domination. Thus, the resistance against respecting SOGIE rights is much bigger and not simply a morality war.

The confluence of these issues and the challenges faced by members of the LGBTIQ+ community are best described by the political slogan, attributable to second-wave feminists, 'the personal is political'.[75] According to this political slogan, women's personal experiences are largely due to the dichotomy between the personal and private spheres.[76] Insisting on the difference between men and women meant perpetuating gender inequality by 'dictating that only men were entitled to inhabit the public space, while women were confined to the private real of domestic life'.[77] This essentially meant that the oppression of women in the domestic sphere was not considered worthy of being the focus of the political struggles by other movements.[78]

Hanisch argues that meetings between women, where they shared their personal experiences, were not therapy sessions as they were often described.[79] She did not attend the meetings to solve any personal problems.[80] She points out that '[o]ne of the first things we discover in these groups is that personal problems are political problems. There are no personal solutions at this time. There is only collective action for a collective solution.'[81]

Rogan and Budgeon capture the arguments that reverberate throughout Hanisch's essay, speaking to power, the dichotomy between the private and public realms, and the interplay between political action and everyday experiences.[82] They further point out that '[b]y asserting that issues such as sexuality or the body are not "merely" private matters, second-wave feminism politicised socio-spatial relations structured by the gendered public/private distinction.'[83]

75 C Hanisch *The personal is political* (1969).
76 V Miseres 'The personal is political': Teaching gender and nation through nineteenth-century texts' in L Gómez and others (eds) *Teaching gender through Latin American, Latino, and Iberian texts and cultures* (2015) 57.
77 As above.
78 F Rogan & S Budgeon 'The personal is political: Assessing feminist fundamentals in the digital age' (2018) 7 *Social Sciences* 1.
79 Hanisch (n 75) 1.
80 As above.
81 As above.
82 Rogan & Budgeon (n 78) 2.
83 Rogan & Budgeon (n 78) 3.

The sexualisation of members of the LGBTIQ+ community is the impetus for the adoption of anti-homosexuality laws.[84] Thus, homosexuals are often essentialised, dehumanised and criminalised in the debates leading up to the adoption of these anti-homosexuality laws. The dehumanisation of members of the LGBTIQ+, to the extent that there is no attempt to see their value as human beings beyond their perceived sexual behaviours, is part of the unwritten plot to remove their issues from the public sphere. Anti-homosexuality laws, in fact, are a tool by the state to silence members of the LGBTIQ+ community and to remove them – and their issues or concerns – from the public sphere.[85] The attendant argument that SOGIE issues are moral or private issues, therefore, is an attempt to keep the oppression of the queer community in the domestic sphere, where the intervention by the state is usually discouraged and expected in very limited circumstances. Doing so justifies the state-sponsored brutality that characterises the personal experiences of most members of the LGBTIQ+ community. This is so because such brutality happens mostly in the private sphere, openly so. The justification nonetheless ignores the fact that the personal problems of members of the LGBTIQ+, as highlighted above, in fact, remain political problems. Hanisch's words, albeit in the context of women, are apt when she indicates that '[t]here are no personal solutions at this time. There is only collective action for a collective solution.'[86]

For the above reasons, instead of making progress in guaranteeing the rights of members of the queer community in Africa, the total opposite is evident from most African states. There is the proliferation

84 R Morgan 'Sexualisation' (2024) 102 *Australasian Journal of Philosophy* 486, defines sexualisation as 'the treatment of a person as a sexual entity. It occurs when some actual or perceived sexual property of a person is foregrounded, where the relevant properties concern a person's (actual or perceived) capacity for sexual desire and/or a person's (actual or perceived) role in the sexual desires of others. A property is foregrounded when a person comments on or otherwise responds to this property and thereby introduces it to the score of the encounter.'

85 P Onanuga & S Josef 'Blame colonialism? or "blame the government"? Identity construction and ideological framing in homosexuality narratives on Nigerian Twitter1' (undated report) pointing out that '[p]rior to the widespread use of social media platforms in Nigeria, however, sex and topics around sexuality were often avoided in the public. This is reflective of the perspective to sex by many of Nigeria's densely multicultural societies. Even more hushed is any discussion on homosexuality or other forms of non-heterosexuality, since these are perceived as immoral and foreign, thus unacceptable.'

86 Hanisch (n 75) 1.

of anti-homosexuality laws and court decisions that are inimical to the promotion and protection of SOGIE rights. Owing to the similarity, both in intent and substance, of the anti-homosexuality laws in Ghana, Nigeria and Uganda, the fear is that these laws may be replicated across Africa. As it stands, legal reforms in Kenya, Namibia, Zambia and Malawi have shown the appetite for the adoption of similar laws. In Botswana, efforts by the legislature to implement the decision of the Court of Appeal by removing sodomy laws from the Penal Code were met with so much public resistance that Parliament eventually postponed the amendment of the penal laws. SOGIE rights or issues in Africa are likely to continue to be undermined by the adoption of harsh anti-homosexuality laws. The explanation lies in the fact that African legislators, principally, have somehow identified SOGIE rights as a site for the fight against imperialism by the West. The cost for this resistance is not, as indicated above, considered as costly.

5 Conclusion

This chapter reaffirms that the violation of SOGIE rights in Africa is not merely a legal or policy issue but is deeply entrenched in broader political, cultural and historical dynamics. Anti-homosexuality laws, often cloaked in the rhetoric of morality, tradition or religion, are wielded as tools of exclusion and dehumanisation. These laws draw from a colonial legacy yet are paradoxically employed as instruments of resistance against perceived Western imperialism. This complex interplay has entrenched SOGIE rights as one of the most intractable human rights issues on the continent, with African legislatures and societies at large continuing to weaponise legal frameworks to perpetuate violence, silence dissent, and marginalise already vulnerable communities.

The persistence of these laws and the narratives that sustain them are indicative of a deeper societal struggle over who is entitled to recognition, rights and dignity. The stark contrast between progressive legal strides in countries such as Namibia, Botswana and Mauritius, and the regressive measures in Ghana, Uganda and Nigeria highlights the uneven terrain on which SOGIE rights are contested. While some judiciaries have shown boldness in affirming constitutional protections for the queer community, such progress is constantly undermined by reactionary politics, religious orthodoxy and state-sanctioned violence. These dynamics further underscore the importance of situating SOGIE

rights within the broader framework of human rights and democratic governance.

The chapter also powerfully draws on the feminist slogan 'the personal is political' to make the case that the everyday struggles of queer Africans are not isolated or private matters. Rather, they are intensely political acts of resistance against the erasure of identity, autonomy and agency. Anti-homosexuality laws function not only as punitive statutes but also as symbolic instruments to push queer bodies and narratives out of the public sphere. In doing so, they relegate queerness to a private domain stripped of legal protection and public discourse. This intentional silencing reveals the extent to which states go to depoliticise queerness while paradoxically using it as a rallying point for political mobilisation.

Ultimately, the way forward must involve collective action rooted in solidarity, informed legal reform and unwavering commitment to the universality of human rights. The fight for SOGIE rights in Africa must be reframed not as an external imposition, but as an internal struggle for justice, dignity and equality. As the chapter rightly asserts, there are no personal solutions to what are clearly systemic and political problems. Only through intersectional, multi-level strategies that challenge both the legal and socio-cultural roots of exclusion can meaningful progress be made. The call, therefore, is not merely for tolerance or reform, but for a transformative politic that centres queer voices and demands full and unconditional inclusion in the African human rights discourse.